Rule 2, Ariz. R. Crim. P.

Charging – Vindictive prosecution and charging……Revised 12/2009

The concept of "vindictiveness" developed in the context of *judicial* vindictiveness in the seminal case of *North Carolina v. Pearce*, 395 U.S. 711 (1969), *overruled in part by Alabama v. Smith*, 490 U.S. 794 (1989). *Pearce* held that when a convicted defendant successfully appealed his conviction and was retried, the court could not "retaliate" against the defendant by imposing a more severe sentence on retrial, thus effectively punishing him for exercising his legal right to appeal. Nevertheless, the Court stressed that a defendant could legitimately receive a more severe sentence on retrial if objective reasons concerning the defendant's conduct subsequent to the first sentencing became apparent to the court at the second trial and sentencing. The Court concluded that "whenever a judge imposes a more severe sentence upon a defendant after a new trial, the reasons for his doing so must affirmatively appear," and the judge's reasons "must be based upon objective information concerning identifiable conduct on the part of the defendant *occurring after the time of the original sentencing proceeding*." *Id*. at 726 [emphasis added].

The Supreme Court later overruled *Pearce*, *supra*, in part, in *Alabama v. Smith*, 490 U.S. 794 (1989). In *Smith*, the defendant pleaded guilty to burglary and rape in return for the State's dismissing another charge, and was sentenced on those two counts to 30 years. The defendant later succeeded in having his guilty plea vacated and all three original charges were reinstated. He went to trial on those three charges and was convicted on all three charges. The trial judge noted that when he had imposed sentence on the burglary charge originally, he had heard only the defendant's side of

the story. After hearing all the evidence presented at trial, the judge concluded that the original sentence was too lenient and imposed a longer sentence of 150 years. Relying on *Pearce*, *supra*, the Alabama Supreme Court held that the increased sentence on the burglary charge created a presumption of vindictiveness because the increase was not justified by events subsequent to the original sentence, but by "new information about events occurring prior to the imposition of the original sentence." *Pearce* at 797.

In *Alabama v. Smith*, 490 U.S. 794 (1989), the United States Supreme Court reversed, overruling *Pearce*, *supra*, in part, and held, "no presumption of vindictiveness arises when the first sentence was based upon a guilty plea, and the second sentence follows a trial." 490 U.S. at 795. The Court reasoned, "A guilty plea may justify leniency," and noted that a prosecutor may legitimately offer a reduction of sentence as part of plea bargaining. *Id*. at 802-03. Further, the information made available to the judge in a change of plea proceeding is ordinarily quite limited. *Id*. On the other hand, when there has been a full trial on the merits, "in the course of the proof at trial the judge may gather a fuller appreciation of the nature and extent of the crimes charged," and the defendant's "conduct during trial may give the judge insights into his moral character and suitability for rehabilitation." *Id*. at 801. Accordingly, the Court held, "there is no basis for a presumption of vindictiveness where a second sentence imposed after a trial is heavier than a first sentence imposed after a guilty plea." *Id*. at 803.

After *Pearce*, *supra*, the Supreme Court extended the "vindictiveness" concept to include *prosecutorial* vindictiveness in *Blackledge v. Perry*, 417 U.S. 21 (1974). In that case, the defendant was convicted on a misdemeanor assault charge and appealed**,** meaning that, under state law, the conviction was annulled and defendant was granted

a *de novo* trial in superior court. *Id.* at 22. Before the superior court trial began, the prosecutor obtained an indictment based on the same conduct but charging a felony offense. *Id.* The Supreme Court held that for the prosecution to indict on the felony charge constituted an impermissible penalty on the defendant for exercising his legal right to appeal. *Id. at* 28-29. The Court stated that a person convicted of an offense was entitled to pursue his appellate remedies without fear of the prosecution's retaliation by substituting a more serious charge for the original one. *Id.* at 28.

The Supreme Court followed *Blackledge* with *Bordenkircher v. Hayes*, 434 U.S. 357 (1978). Hayes, who had prior convictions, was charged and arraigned. During plea negotiations, the prosecutor told Hayes and his counsel that if Hayes would not plead guilty and accept the State's offer of a five-year prison term, the prosecutor would return to the grand jury and obtain an indictment under a habitual criminal act, subjecting Hayes to mandatory life imprisonment because of his prior convictions. Hayes claimed his due process rights were violated under the principles of *Blackledge*, *supra*. The Supreme Court disagreed, finding no constitutional violation in the prosecutor's threatening to file additional charges or more severe charges as an incentive for a defendant to plead guilty. The Court distinguished the case from *Pearce* and *Blackledge*, *supra*:

> In those cases the Court was dealing with the State's unilateral imposition of a penalty upon a defendant who had chosen to exercise a legal right to attack his original conviction – a situation very different from the give-and-take negotiation common in plea bargaining between the prosecution and defense, which arguably possess relatively equal bargaining power. The Court has emphasized that the due process violation in cases such as *Pearce* and *Perry* lay not in the possibility that a defendant might be deterred from the exercise of a legal right, but rather in the danger that the State might be retaliating against the accused for lawfully attacking his conviction.

> To punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort, and for an agent of the State to pursue a course of action whose objective is to penalize a person's reliance on his legal rights is patently unconstitutional. But in the "give-and-take" of plea bargaining, there is no such element of punishment or retaliation so long as the accused is free to accept or reject the prosecution's offer.

Bordenkircher v. Hayes, 434 U.S. 357, 362-63 [citations, quotation marks, and footnotes omitted]. The Court reasoned that since Hayes could have been charged as a habitual offender from the outset, it was within the prosecutor's discretion to decide whether, and when, to charge him, and what charges to file.

In *State v. Brun*, 190 Ariz. 505, 950 P.2d 164 (App. 1997) *abrogating State v. Hinton*, 123 Ariz. 575, 601 P.2d 338 (App. 1979), the Court of Appeals stated:

> A defendant may prove prosecutorial vindictiveness by proving objectively that the prosecutor's charging decision was motivated by a desire to punish him for doing something that the law plainly allowed him to do. Because actual vindictiveness is difficult to prove, a defendant in some circumstances may rely on a presumption of vindictiveness.

State v. Brun, 190 Ariz. at 506, 950 P.2d at 165 [citations and quotation marks omitted]. Brun was originally charged with a misdemeanor DUI, although the State knew from the outset that he had prior out-of-state DUI convictions and a suspended license. It took a considerable amount of time to obtain the out-of-state records because the State was apparently "less than diligent" in pursuing them. *Id*. at 507, 950 P.2d at 166. Once the State received the out-of-state records, the State moved to dismiss the misdemeanor DUI charge and refiled the matter as a felony. Brun then moved to dismiss the felony prosecution, arguing that the State was acting vindictively to punish him for filing routine motions to suppress and a demand for jury trial. The trial court dismissed the felony charge, finding that Brun had shown a presumption that the State had acted vindictively. However, the Court of Appeals reversed, finding no presumption of vindictiveness. The

Court stated, “[N]othing the State did or did not do realistically suggests a likelihood that it filed a felony charge in retaliation for Defendant’s routine assertion of procedural rights.” *Id*. at 507, 950 P.2d at 166. Therefore, if the State has objective reasons for increasing the charges on a defendant, the Arizona courts will not presume any vindictiveness.

Compare State v. Tsosie, 171 Ariz. 683, 832 P.2d 700 (App. 1992), in which the Court of Appeals held that reindictment on more serious charges, following the defendant’s successful invocation of his right to speedy trial, raised a presumption of vindictive prosecution that the State failed to rebut.

Note that it is not vindictive prosecution to withdraw a plea offer before the trial court accepts it. Rule 17.4(b), Ariz. R. Crim. P., explicitly allows the prosecutor to withdraw the plea offer if the court has not accepted it. *State v. Webb*, 140 Ariz. 321, 323, 681 P.2d 473, 475 (App. 1984).